

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000271-001 DT

07/15/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT  
T. Melius  
Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

SCOTT A BLAIR (001)

CHRISTOPHER T RAPP

REMAND DESK-LCA-CCC  
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CR 2009041583**

Defendant Appellant Scott Blair (Defendant) was convicted in the Scottsdale Municipal Court of criminal trespass. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

This appeal results from actions directly related to Defendant's representation of his client in a real property dispute. On October 31, 2009, Defendant went to the neighbor's property to try and negotiate a settlement because the neighbor's wall and construction activities were interfering with his client's peaceable enjoyment of her property. The victim—Jared Willard—was assisting the property owners with their remodeling.<sup>1</sup> While there, the parties argued. The argument lasted approximately 4 minutes.

At trial—on August 20, 2010—both the Defendant and the victim provided contradictory information about (1) the encounter on the day of the offense as well as (2) their earlier contact.<sup>2</sup> The victim testified and gave his version of the initial contact as well as of the trespass. The victim testified he was not the property owner but was working on the property at the time of the incident. He stated he first encountered Defendant at the property about two weeks prior to the trespass incident when he looked out the back window and saw Defendant standing in the backyard.<sup>3</sup> He stated Defendant was not invited onto the property at any time.<sup>4</sup> Mr. Willard

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<sup>1</sup> The victim is the son-in-law of the property owners for the adjacent home.

<sup>2</sup> Transcript of August 20, 2010, and October 11, 2010, bench trial.

<sup>3</sup> *Id.* at p. 12, ll. 9–13.

<sup>4</sup> *Id.* at p. 12, ll. 21–23.

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further claimed the Defendant engaged in heated discussion<sup>5</sup> about the height of the wall at their first encounter. The parties discussed the possibility of raising the wall between the properties and Mr. Willard alleged he asked Defendant if the parties could split the cost for the wall but Defendant refused.<sup>6</sup> In contrast, Defendant recalled this conversation but testified the initial meeting was friendly, he was invited onto the property,<sup>7</sup> and he offered to have his client split the cost of raising the wall.<sup>8</sup>

Both parties to the dispute gave their descriptions of the altercation. Mr. Willard testified he was in the home when Defendant suddenly appeared. He said Defendant was not invited and had been informed previously<sup>9</sup> that he would need permission to come on the property.<sup>10</sup> He further maintained Defendant was aggressive<sup>11</sup> and was asked to leave the home at least five times.<sup>12</sup> Defendant remained in the home for a short time—4 to 8 minutes before leaving.<sup>13</sup>

Defendant's version of the parties' interaction greatly differed from that of Mr. Willard. Defendant asserted the initial contact was very friendly.<sup>14</sup> On the day of the trespass, Mr. Willard went to the home where the doors were open and people were "coming and going."<sup>15</sup> After knocking, Defendant thought he heard someone say to come in. He went in.<sup>16</sup> Defendant testified he was not told to leave and had he been requested to leave, he would have done so.<sup>17</sup> Defendant stated Mr. Willard told him the property owners planned to sell the home and were not interested in spending any money on the wall.<sup>18</sup> At that point, Defendant informed Mr. Willard that the dispute would need to be disclosed when the home is sold. Defendant then stated: "At that point he went off on me."<sup>19</sup> Defendant stated Mr. Willard would not allow him to leave<sup>20</sup> and acted aggressively toward him. Defendant also stated Mr. Willard followed him down the street and shoved him.<sup>21</sup>

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<sup>5</sup> *Id.* at p. 14, l. 16.

<sup>6</sup> *Id.* at p. 14, ll. 23–25.

<sup>7</sup> *Id.* at p. 55, ll. 17–25.

<sup>8</sup> *Id.* at p. 56, ll. 15–22.

<sup>9</sup> *Id.* at p. 21, ll. 1–12.

<sup>10</sup> *Id.* at p. 15, ll. 23–25.

<sup>11</sup> *Id.* at p. 22, ll. 21–25.

<sup>12</sup> *Id.* at p. 16, ll. 20–25; p. 17, ll. 1–6. In contrast, the witness to the argument—Mr. Modeer—could not recall Mr. Willard asking Defendant to leave. Instead, the witness testified he heard Mr. Willard say "I'd like to step out. I'd like to take this out front." Transcript, p. 32, ll. 8–15. and ll. 9–22.

<sup>13</sup> *Id.* at p. 27, ll. 1–12; p. 33 ll. 9–10.

<sup>14</sup> *Id.* at p. 56, ll. 15–22.

<sup>15</sup> *Id.* at p. 58, ll. 14–17.

<sup>16</sup> *Id.* at p. 58, ll. 20–23.

<sup>17</sup> *Id.* at p. 59, ll. 20–25; p. 62, ll. 12–18.

<sup>18</sup> *Id.* at p. 60, ll. 9–17; p. 68, ll. 14–16.

<sup>19</sup> *Id.* at p. 61, ll. 11–22.

<sup>20</sup> *Id.* at p. 61, ll. 23–25.

<sup>21</sup> *Id.* at p. 65, ll. 16–25 and p. 66, ll. 4–8.

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The criminal complaint in this matter was filed on December 11, 2009. Defendant—on behalf of his client—then filed a lawsuit against the property owners in Superior Court, CV2010-007309.<sup>22</sup> Because the parties were still involved with a civil—real property—dispute, the parties continued to have contact with each other. On June, 23, 2010, the Superior Court judge assigned to the civil case—Judge Heilman—conducted a settlement conference and the parties allegedly reached a “global settlement” which included a misdemeanor compromise.<sup>23</sup> The prosecutor was allegedly kept apprised of the settlement negotiations, and allegedly consented to the misdemeanor compromise. The settlement agreement was allegedly filed with the Superior Court but a copy was not filed with the trial court.<sup>24</sup> The victim did not sign the settlement documentation and did not prepare a misdemeanor compromise. Defendant went to trial on the trespassing claim and was convicted on August 20, 2010. Sentencing was postponed.

Prior to sentencing, the civil matter was re-assigned to another Superior Court judge—Judge Foster—who heard oral argument on the settlement agreement and its included misdemeanor compromise language. On October 7, 2010, the Superior Court judge issued his ruling finding—as a matter of law—the settlement agreement was enforceable. The judge ordered the parties to comply and specifically ordered the victim to execute the misdemeanor compromise.<sup>25</sup> The victim failed to do so. A copy of this Minute Entry was filed with the trial court.<sup>26</sup>

Defendant also filed a Motion to Vacate the trial court judgment claiming (1) the trial court failed to determine if Defendant’s conduct was privileged; and (2) the trial court failed to determine whether the criminal trespass statute was being used to resolve a civil property dispute. Defendant also requested a Motion to Stay sentencing to enable the victim to sign a misdemeanor compromise and follow Judge Foster’s Minute Entry ruling. The trial court denied both the Motion to Vacate and the Motion to Stay.

Following sentencing, Defendant filed a timely appeal claiming (1) the trial court erred when it failed to follow the law of the case as established by the Superior Court judge; (2) the trial court erred when it failed to follow Arizona’s “policy” of not allowing a criminal trespass statute to affect a real property dispute; and (3) the trial court erred when it failed to find

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<sup>22</sup> Appellant’s Memorandum, dated March 14, 2011, at p. 3

<sup>23</sup> *Id.* at p. 3, l. 25. Defendant produced no evidence that the Scottsdale City Prosecutor was informed about the “global settlement” or the misdemeanor compromise. This Court recognizes that Defendant’s counsel argued about the misdemeanor compromise and stated he kept the prosecutor “apprised at all times of the - - actions in the civil case.” Trial Transcript, p. 85, ll.1–6. These comments, however, are argument and not evidence.

<sup>24</sup> A settlement agreement was not included as part of the case file for this case.

<sup>25</sup> October 8, 2010 Minute Entry of Judge George H. Foster, Jr., in CV2010-007309. This court is not privy to the settlement negotiations that resulted in this Minute Entry and neither party has enlightened this Court about the details of the compromise, who it was intended to cover, or why the victim was ordered to file a misdemeanor compromise for Defendant when Defendant was not a party to the litigation.

<sup>26</sup> The Minute Entry was attached to Defendant’s Motion to Stay dated October 11, 2010.

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Defendant's conduct was privileged. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

*A. Did the Trial Court Err by Failing to Follow "The Law of the Case" as Established by the Superior Court Judge.*

Defendant alleges the trial court erred by failing to follow Judge Foster's Minute Entry requiring the victim to prepare a misdemeanor compromise of the criminal trespass action. To bolster this claim, Defendant asserts the misdemeanor compromise was part of a global settlement of the real property dispute. This assertion, however, is inaccurate. The civil dispute—a dispute between neighbors—initially involved Stephanie Jackson and Mr. and Mrs. Williams. Defendant filed the suit as Ms. Jackson's attorney. He was not a co-plaintiff in the lawsuit. Additionally, the victim—Mr. Willard—was not a named party to the lawsuit at the time of the misdemeanor trial. It was only after the trial concluded and guilt had been established that Mr. Willard was added as a co-defendant on this civil action.<sup>27</sup>

A "law of the case" argument requires a unity of the parties and claims. This is absent in the current situation. In discussing the requirements for the "law of the case" doctrine, our Supreme Court stated:

The term "law of the case" refers to a legal doctrine providing that the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate court, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested.

*Dancing Sunshines Lounge, v. Industrial Com'n of Arizona*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). The doctrine is generally one of policy and not law. *Id.* It is not absolute and should only be used where the facts, issues, and evidence are substantially the same in the second case as they were in the first case. *Lennar Corporation v. TransAmerica Insurance Co.*, \_\_ Ariz. \_\_, \_\_ P.3d \_\_, 2011 WL 2673156 ¶ 12 (Ct. App. July 5, 2011) (No. 1 CA-CV10-0141).

That is not the situation currently before this court. Although the victim may now be a party to the civil proceeding, the victim was not a party at the time of trial.<sup>28</sup> Furthermore, the Defendant is not a named party to the civil action. Indeed, Defendant was careful to remind the court he was at the Williams' home in his representative capacity. He stated he "just [sic] represent a

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<sup>27</sup> The prosecutor argued Defendant filed an amended complaint five days after the misdemeanor trial and added the victim as a co-defendant at that time. Trial Transcript, p. 89, ll. 18-19.

<sup>28</sup> Judge Foster's Minute Entry of October 8, 2010, lists Stephanie Jackson as the only plaintiff and lists Defendant as her attorney in this matter. Consequently, his only involvement in the civil action is in his representative capacity and, perhaps, as the recipient of a proposed benefit. He is not a party to the case.

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client”<sup>29</sup> and he did not have a personal interest in the civil claim. Additionally, the issue before the trial court—trespass—is not the same as the issue before the Superior Court.

Defendant acknowledges he failed to request a continuance of the August 20, 2010, trial date until the “global settlement” issue could be resolved. He was aware that defendants can ask that trials be postponed. Earlier in this case Defendant requested a continuance of the July 19, 2010, scheduled trial so that the “global settlement” could be finalized. When the settlement agreement was not signed, Defendant failed to request any further continuance. He also failed to apprise the trial court of his need for a continuance on August 20, 2010 when he appeared for trial and announced ready. Consequently, even if the “law of the case” doctrine applied to Defendant—which it does not—it would not relieve Defendant from his conviction as he did not raise the issue with the trial court. Having failed to raise the issue, Defendant waived it and the trial court correctly denied Defendant’s argument about the effect of the “global settlement.”

Defendant also misconstrues what occurred at trial. In his Appellant’s Memorandum, Defendant suggests the trial court should have acquiesced with Defendant’s requests based on his “law of the case” argument because “a final judgment had yet to be entered in the criminal matter.”<sup>30</sup> This is not accurate. Judgment occurred when the trial court found Defendant guilty. Ariz. R. Crim. P., Rule 26.1 (a) states:

The term judgment means the adjudication of the court based upon the verdict of the jury, upon the plea of the defendant or upon its own finding following a non-jury trial, that the defendant is guilty or not guilty.

Judgment occurred on August 20, 2010 when the trial court said:<sup>31</sup>

I am going to find that the State met their burden of proof. I find credible evidence beyond a reasonable doubt that the defendant either knowingly entered, or remained unlawfully after being asked to leave by the person having lawful control over the property. State, do you have a recommendation as to sentencing?

Finally, Judge Foster’s Minute Entry in the Superior Court action occurred almost two months after Defendant was found guilty by the trial court. As there is no unity of parties or claims, the cases are separate and distinct. Consequently, Defendant’s argument about the “law of the case” fails.

*B. Did the Trial Court Err When It Failed To Follow Arizona’s “Policy” of Not Allowing a Criminal Trespass Statute To Affect a Real Property Dispute.*

Defendant misconstrues the “policy” of not allowing the criminal trespass statute to affect a civil real property dispute in this case. Defendant asserts the criminal trespass complaint “arose”

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<sup>29</sup> Transcript, p. 60, ll. 8–9.

<sup>30</sup> Appellant’s Memorandum, p. 7, ll. 4–14.

<sup>31</sup> Transcript, p. 80, ll. 24–25 and p. 81, ll. 1–4

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out of the civil real property disputes between his client and the Williamses. This stretches the facts in the case before this court as neither his client nor the Williamses were involved in the trespass.

*In re Juvenile Action No. JV-512490*, 189 Ariz. 318, 942 P.2d 477 (Ct. App. 1997) is the lead case in this area. In *In re Juvenile Action JV-512490, id.*, the Court of Appeals confronted a situation where a juvenile maintained a bona fide claim of right to be on the property. In discussing the juvenile's right to be on the property, the Court of Appeals ruled:

A conviction for criminal trespass "cannot be upheld if ownership of the property is disputed between the complaining witness and the defendant.

*Id.*, at 320, 942 P.2d at 479. The court then continued and held:

To prevail on the motion to dismiss, however, Appellant did not have to prove the existence of an easement broader than caring for the horses; she merely had to show a *bona fide* claim of right to be on the property on the occasion in question. If such a claim was shown, the criminal trespass count should have been dismissed.

*Id.* at 321, 942 P.2d at 480. The situation in the current case differs greatly from that of *In re Juvenile Action No. JV-512490* as the Defendant in this case did not have a bona fide claim of right to be on the Williams' property. Simply stated, an individual does not have a right to be on the property of another. A lawyer does not have a claim of right to be on the property of a potentially adverse party and cannot bootstrap his later filing of a claim<sup>32</sup> against the property owner to create this defense. Absent such claim of right, Defendant's argument fails

*C. Did the Trial Court Err When It Failed to Vacate or Stay the Action Until the Superior Court Action Ended.*

Defendant asserts the trial court had an obligation to enforce Judge Foster's Minute Entry ordering the victim to prepare a misdemeanor compromise. The trial court found no obligation. In denying Defendant's request for a stay of sentencing and motion to vacate, the trial court determined that motions to vacate may only be granted for three reasons: (1) the Court lacked jurisdiction over the action; (2) newly discovered material facts; and (3) the conviction was obtained in violation of either the U.S. Constitution or the Arizona Constitution. Arizona R. Crim. P., Rule 24.2. Defendant did not allege any of these reasons. A Motion to Vacate is not a second bite at the apple. Consequently, and because Defendant did not allege any of the allowed reasons for a Motion to Vacate, this Court finds the trial court correctly resolved this issue.

Additionally, Defendant failed to provide authority showing a stay in the proceedings would have affected his earlier conviction. The Motion to Stay requested the trial court to "stay all further proceedings" to "allow the victim (Jerrott [sic] Willard) to comply with Honorable

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<sup>32</sup> The trespass incident occurred on October 31, 2009. The civil action was not filed until 2010.

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George H. Foster, Jr.'s minute entry dated October 8, 2010 . . . to sign a misdemeanor compromise to dismiss this matter." The Motion to Stay was dated October 11, 2010. By that date Defendant had been convicted of trespass.

Defendant provided this Court no authority showing a misdemeanor compromise signed after a trial ended should or could result in vacating the determination of guilt. Indeed, the misdemeanor compromise statute, A.R.S. § 13-3981 (C) is permissive; discretionary; and requires compromise occur before trial.

If the party injured appears before the court in which the action is pending at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed, and the defendant discharged.

*Id.* It is clear the compromising party must appear "before trial". If the compromising party does provide a compromise, the court "may" order that the prosecution be dismissed. The language is discretionary, not mandatory.

Defendant's Motion to Stay requested a stay of further proceedings. It was not a request to reverse a conviction. Motions to Stay are prospective. They are requests to stop or postpone acts. The acts to be halted are future actions. The Motion to Stay is not equivalent to a request to rewrite the past.

Defendant confuses a conviction with sentencing. Defendant was convicted of trespass on August 20, 2010. After the trial court found Defendant guilty, his counsel requested a delay in sentencing. Sentencing is a separate phase of a criminal trial. Ariz. R. Crim. P., Rule 26.1 (a) and (b).<sup>33</sup> A delay in sentencing is not the same as a request for a new trial.

*D. Did the Trial Court Err When It Failed to Find Defendant's Conduct Was Privileged.*

Defendant asserted—at time of sentencing—his conduct was privileged. He failed to raise this defense at trial.<sup>34</sup> The trial court refused to rule on the privilege issue as it was not properly raised at time of trial. Similarly, this Court will not consider this defense on appeal. An appellate court usually will not address issues that were not first presented at trial. *Town of South Tucson v. Board of Sup'rs of Pima County*, 52 Ariz. 575, 582, 84 P.2d 581, 584 (1938); *accord*, *Harris v. Cochise Health Systems*, 215 Ariz. 344, 160 P.3d 223 ¶ 17 (Ct. App. 2007).

Defendant concedes he did not raise this issue. He now seeks to have the appellate court determine the trial court committed fundamental error by not investigating and presenting the issue on Defendant's behalf. The Arizona Supreme Court described fundamental error as follows:

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<sup>33</sup> Judgment is the adjudication of the court while sentence is the court's pronouncement of the penalty imposed on a defendant after a judgment of guilty.

<sup>34</sup> Transcript, p. 87, ll. 7-14. The trial judge remarked he did not remember hearing the defense of privilege being asserted in the underlying action and therefore would not consider this defense at the sentencing phase.

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We have described fundamental error as error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.

*State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984) (citation omitted). Accord, *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 ¶ 7 (2008). Courts review for fundamental error when a defendant fails to object to alleged trial error. The Defendant forfeits the right to obtain appellate relief except in those limited and rare instances where the error is so great the defendant could not possibly have received a fair trial. *State v. Henderson*, 210 Ariz. 561, 115 P.3d 601 ¶ 19 (2005). Thus, even if error occurred, the Defendant must establish the prejudicial nature of the error and demonstrate the error goes to the foundation of Defendant's case.

Defendant asserts the trial court had a duty to determine if his conduct was privileged. A.R.S. §13-1501(2) states:

“enter or remain unlawfully” means an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged....

The statute is written in the disjunctive. The word “or” is a disjunctive particle. It is used to give a choice or express an alternative. *State v. Pinto*, 179 Ariz. 593, 595, 880 P.2d 1139, 1141 (Ct. App. 1994). The trial court, in its ruling,<sup>35</sup> specifically addressed the interpretation of the statute as it applied to the facts in this case and stated:

But the next prong is, did he remain unlawfully after being asked to leave? Witnesses for the State, Mr. Modeer and Mr. Willard testified that he was repeatedly asked to leave. I believe that prong was met.

Because the court considered the language of the statute and because Defendant did not show the prejudicial nature of any error this court finds no fundamental error.

*E. Did the State Present Sufficient Evidence that Defendant's Actions Constituted Trespassing*

Defendant alleges the State failed to present sufficient evidence to warrant his conviction for trespassing. The evidence is contradictory and Defendant's statements about the incident directly contravene comments made by the victim and by the State's witness.

Appellate courts do not re-weigh the evidence to see if the appellate court would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Instead, the appellate court is limited to determining if the prevailing party pre-

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<sup>35</sup> *Id.* p. 80, ll. 16-19.  
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sented sufficient evidence to prove the case. In addressing the question of sufficiency of the evidence, the Arizona Supreme Court said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684 ¶ 16 (2009) (citations omitted). Here the evidence is conflicting. In addressing the role of the appellate court when reviewing conflicting evidence the Arizona Supreme Court stated:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

*State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). In this case, the State presented evidence of trespassing. Defendant disagreed with the victim’s interpretation of the events. However, the State demonstrated the home did not belong to Defendant and both the victim and Mr. Modeer—a workman who was present at the time Defendant was in the home—testified Defendant was asked to leave but did not do so. The trial judge found the amount of time Defendant remained in the home was not a material factor under the trespassing statute. Because this determination is an “assessment of conflicting procedural, factual or equitable considerations which vary from case to case” rather than a “question . . . of law or logic”, it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.” This Court concludes the trial court correctly resolved this case.

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III. CONCLUSION.

Based on the foregoing, this Court concludes the Scottsdale Municipal Court did not err when it found Defendant guilty of trespassing.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

JUDICIAL OFFICER OF THE SUPERIOR COURT

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